United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 76-7252

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

CITY OF DETROIT, et al.,

v.

GRINNELL CORPORATION, et al.

BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, *Claimants, Appellants.*

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF CLASS MEMBERS-APPELLANTS

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PRELIMINARY STATEMENT

Appellants, Objectors to the fee award made below, submit this reply to the "Brief of Counsel For Class Representative—Appellees" (hereinafter "Petitioner's Brief").

I. SUMMARY OF *APPELLEE'S* ARGUMENT

A brief summary of Petitioner's argument puts this appeal in proper perspective: This Court should decline to

review the District Court's failure to follow the mandate of its landmark decision in *Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell I*") disposing of the first appeal, but rather should simply rubber stamp the District Court's second excessive fee award. This viewpoint is the epitome of what Circuit Judge Gibbons, joined by Chief Judge Seitz, aptly described as the " 'déjà vu' or 'fatigue' school of jurisprudence" in *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 1976-2 Trade Cas ¶ 61,039 at 69,645 (3rd Cir. 1976) ("*Lindy II*").

II. THE DECISION IN *LINDY II* DEMONSTRATES THAT THE DISTRICT COURT'S SECOND FEE AWARD SHOULD BE SET ASIDE

In *Lindy II*, the Third Circuit, sitting *en banc*, reduced the second fee award made by the District Court on remand from approximately $926,000 to $296,000. *Id.* at 69,639. The initial fee award in the *Plumbing Fixtures Litigation* of $1,375,000 had been vacated in *Lindy I*, 487 F.2d 161, 170 (3rd Cir. 1973). *Thus, the ultimate fee award of $296,000 ordered by the Third Circuit in Lindy II was approximately $1,080,000 less than the initial fee award made by the District Court.* Accordingly, *Lindy II* not only continued the trend in appellate courts toward curbing excessive fee awards, but emphatically gave that trend renewed impetus.

In addition, Judge Gibbons and Chief Judge Seitz would have set aside in *Lindy II* the District Court's findings in its second fee decision as clearly erroneous, and would have held that the doubling of the applicants' fees detemined on an hourly basis because of the so-called "contingency" or "quality" factors constituted an abuse of discretion. *Id.* at 69,644-69,646. They concluded that the $296,000 fee award made by the Court of Appeals was the result of "the pragmatism of appellate judges who, overwhelmed by the caseload, yield to the temptation of affording undue deference to the initial decisionmaker." *Id.* at 69,645. Just as the Dis-

trict Court's decision below requires reversal because of its deviation from this Court's prior mandate, Judges Seitz and Gibbons concluded in *Lindy II* that the lower court's deviation from the mandate in *Lindy I—which the full Court acknowledged*—required reversal. Judge Gibbons, with Chief Judge Seitz concurring, incisively wrote:

> I have no stronger desire than Judge Aldisert [1] to engage in endurance contests with district courts, but if the rule of law is to be preserved, our stamina must be equal to theirs. Reversible error has once again been committed below, and I believe that we are duty-bound to grant relief from that error.
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> Recognizing that mathematical precision in applying the standards established in *Lindy Brothers I* and the decision today is neither possible nor necessary, something more than was done here [below] is required. . . . *We should not shirk that obligation in this or any other case for the sake of closing the file. Id.* at 69,645-69,646. (Footnote omitted; emphasis supplied.)

In short, Petitioner's request that the fee award made below should be summarily affirmed is a thinly veiled suggestion that this Court should, in Judge Gibbons' terms in *Lindy II*, "avoid judging." *Id.* at 69,645. In fact, all members of the Court in *Lindy II* concluded that the District Court in the *Plumbing Fixtures Litigation* on remand failed to make the findings required by *Lindy I*—or *Grinnell I*. Judge Aldisert, after setting forth at length what should have been done on remand, stated that the majority did not "endorse the methods or the reasoning employed" by the District Court in making its second fee award. *Id.* at 69,636. However, the majority did not set aside the second fee award in its entirety because "[a]s previously rehearsed, the district court *went to great lengths* to articulate clearly the reasons for its decision." *Id.* at 69,634. (Emphasis supplied.) In fact, Judge Aldisert noted "[t]he district court's

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[1] Circuit Judge Aldisert wrote the majority opinion in *Lindy II*.

struggle with this case on remand." *Id.* at 69,634. Objectors respectfully submit that on remand, the trial judge in the matter now before this Court patently did *not* go "to great lengths to articulate clearly the reasons for its decision," and this Court cannot make findings similar to the ones made by the majority in *Lindy II*.

Lindy II reduced by $630,000 the fees set by the District Court on remand. Thus, that Court fulfilled its appellate function of assuring that Rule 23 benefits inure to injured class members, and not merely their counsel. *Grinnell I, supra,* 495 F.2d at 469, and cases cited therein. In fact, in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F.2d 846, 859 (1952), an antitrust case litigated to judgment, the Eighth Circuit emphatically stated: "[I]t is the duty of appellate courts to protect against 'vicarious generosity' in the matter of attorneys' fees." Moreover, in settled class actions, the court sits in equity, and any fee award is made under the equitable fund theory doctrine. *Grinnell I, supra,* 495 F.2d at 469. As Judge Aldisert wrote, any fee assessed against a class' settlement fund is "a child of equity." *Lindy II,* at 69,637. Hence, the court "acts as a fiduciary . . . of the absent class members" under Rule 23. *Grunin* v. *International House of Pancakes,* 513 F.2d 114, 123-124 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975). *A fortiori,* the court "should avoid any temptation to be overly generous and should not rubber-stamp," 341 F. Supp. at 1009, a District Court's fee award. However, this is the entire gist of Petitioner's argument.

Indeed, Petitioner has asked this Court to ignore its own holding in *Grinnell I* that an appellate court must assure that any fee award in a settled class action is "made with an eye to moderation." 495 F.2d at 470. Ironically, Petitioner contends that the rule of *Grinnell I* should not apply in the very case in which it was announced, and in the very context for which it was specifically remanded by this Court. 495 F.2d at 475.

III. PETITIONER HAS CONCEDED THAT THE DISTRICT COURT'S FINDINGS ARE WHOLLY INADEQUATE

A comparison of the District Court's second fee decision below with the second fee decision in *Lindy*, 382 F. Supp. 999-1028, demonstrates the wholly summary nature of the decision challenged in this appeal. As heretofore stated, in *Lindy II*, the majority noted that "the district court went to great lengths to articulate clearly the reasons for its decisions," *id.* at 69,634, and Judge Harvey rendered a 52 page slip opinion. In stark contrast, Judge Metzner's conclusory decision assessing fees of almost $900,000 against the absent class members is exceedingly brief (A1176-A1179).

Likewise, a comparison of the second fee decision rendered below (A1176-A1179) with the 40 page Proposed Findings Of Fact (A700-A739) filed below by *Petitioner* but *rejected* by Judge Metzner emphatically demonstrates the total inadequacy of the District Court's summary decision (A1176-A1179).[2] When the proposed findings tendered by Petitioner *prior* to the evidentiary hearing (A700-A739) are compared with the District Court's decision, Petitioner himself has effectively conceded that although this matter was remanded for the entry of specific findings setting forth the facts which motivated the District Court's conclusions, those findings could not be made on the basis of the record Petitioner established on remand.

As undoubtedly recognized by Petitioner when the proposed findings were prepared and submitted to the District Court, *Grinnell I* required on remand at the entry of specific factual findings:

> [I]n increasing or decreasing an attorney's compensation [from the fee determined on an hourly basis],

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[2] Petitioner appears to be attempting to argue that his "lengthy proposed findings" which were submitted *prior* to the evidentiary hearing bolster the District Court's brief, conclusory opinion (Petitioner's Br. at 14). The *proposed* findings enhance neither the District Court's decision, nor the record of the hearing, since they were *not* adopted by the District Court.

> *the district judge should set forth as specifically as possible the facts that support his conclusion. . . .* 495 F.2d at 473. (Emphasis supplied.)

This was the law of the case, and the District Court's failure to adhere to it in assessing fees of $900,000 against the class requires reversal. *Greenhalgh* v. *F. D. Rich Co.*, 520 F.2d 886, 889 (9th Cir. 1975); *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 662-663 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Antonioli* v. *Lehigh Coal and Navigation Co.*, 451 F.2d 1171, 1178 (3rd Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Ratay* v. *Lincoln National Life Insurance Co.*, 405 F.2d 286, 288 (3rd Cir. 1968).

Grinnell I's requirement that a trial court set forth factual findings in resolving evidentiary matters was not novel, but rather, merely embodied the requirements of Rule 52(a), Fed.R.Civ.P. Further, the Rule is sound, and its value has long been recognized. In *Protective Committee* v. *Anderson*, 390 U.S. 414, 434 (1968), Mr. Justice White set forth the rationale for requiring a District Court to articulate the facts underlying a discretionary ruling:

> It is essential, . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.

This requirement has been expressly adopted by this Court. *Newman* v. *Stein*, 464 F.2d 689, 692, *cert. denied, sub nom, Benson* v. *Newman*, 409 U.S. 1039 (1972).

The Third Circuit has also recently addressed the guidelines to be followed by trial courts in discretionary matters in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975), relying on both *Protective Committee* v. *Anderson, supra,* and this Court's leading decision in *Gumer* v. *Shearson, Hammill & Co.*, 516 F.2d 283

(2d Cir. 1974). In *Allis-Chalmers,* the Court held that "a proper exercise of discretion" required the District Court "clearly to articulate the reasons and factors underlying its decision":

> We endorse the suggestion contained in *Gumer* as a most desirable practice. . . . [I]t will convey to litigants [or class members] the reasons for the court's decision and will afford the appellate court a meaningful basis for review. . . . 521 F.2d at 364.

Thus, this Court has held that the absence of findings alone may well require reversal. *Dopp* v. *Franklin National Bank,* 461 F.2d 873 at 879, n.15 (1972).

Here, the District Court's failure to make specific findings of fact not only makes meaningful review impossible, but it also eviscerates the key holding of *Grinnell I* that "if for no other reason but to allay suspicion" the District Court should entertain an evidentiary hearing, 495 F.2d at 470, and as a direct corollary, support any fee award by factual findings grounded in the record of that hearing.

IV. THE DISTRICT COURT'S DECISION DOES NOT COMPORT WITH THE MANDATE OF *GRINNELL I*

Notwithstanding Petitioner's repeated assertions to the contrary, the District Court's second fee decision challenged in this appeal does *not* comport with the mandate of *Grinnell I.* This is exemplified by Petitioner's present attempt to shift—retroactively—the burden at the fee hearing to Objectors. (Petitioner's Br. at 15, 18-19.) Petitioner's suggestion that Objectors failed to satisfy below a burden which was not theirs because "Appellants [Objectors] filed no responding papers" (Petitioner's Br. at 14), is at best disingenuous.

The fact of the matter is that the District Court directed that "all papers in connection with the hearing should be served and filed [*simultaneously*] no later than October 31,

1975" (A1163). In their timely filed Prehearing Memorandum (A740-A767), Objectors specifically stated that they "will address primarily the legal guidelines which govern the disposition of this matter on the basis of the record of the evidentiary hearing" (A743) which was set for November 10, 1975. Unless the evidentiary hearing for which this matter was remanded was to be a *pro forma* exercise, only after Petitioner offered his proofs could Objectors address the evidence. However, at the close of the evidentiary hearing, the trial judge refused to allow Objectors' counsel either to make a closing argument or to file post-hearing briefs (A868).[3]

Without doubt, it was *Petitioner's* "heavy burden" on remand to establish the reasonableness of the enormous fees he sought to have impressed upon the class' settlement fund. In *Lindy II*, the Court emphatically described that burden as follows:

> [T]he increase or decrease [from the fee determined on an hourly basis] reflects *exceptional* services only; it may be considered in the nature of a bonus or penalty. The *heavy burden of providing entitlement to such an adjustment is on the moving party. Id.* at 69,635. (Emphasis supplied.)

Thus, it was Petitioner's "heavy burden" of proving that because of some "exceptional" services, he was entitled to any increase fee over and above the hourly "lodestar" fee determination.

Also, *Lindy II* reaffirmed the very clear holdings of *Lindy I* and *Grinnell I* that the fee determined on an hourly basis provides adequate compensation for an attorney's services:

> In making allowance for the quality of work, the court must keep in mind that the attorney will receive an otherwise reasonable compensation for his time under

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[3] In contrast, in the *Lindy* litigation, the District Court followed the more usual course of permitting both sides to present argument following the submission of evidence and to file post-hearing memoranda addressing the facts.

> the figure arrived at from the hourly rate. *Lindy I*, 487 F.2d at 168.

Thus, an attorney's hourly fee can be increased only for work of exceptional quality:

> Any increase or decrease in fees to adjust for the quality of work is designed to take account of an *unusual degree of skill*, be it unusually poor or unusually good. *Id.* at 168. (Emphasis supplied.)

Moreover, because of the practicalities of the practice of law, it is presumed that *not* all categories of services rendered are of such atypically high quality as to warrant an increase in the fee determined on an hourly basis:

> *If* the district judge determines that *particular work* was of *atypical quality*, he should, in increasing or decreasing the fee be cognizant of the amount of time devoted to that given activity. *Id.* at 168-169. (Emphasis supplied.)

Additionally, *Lindy II* made it emphatically clear that because of varying hourly rates, the quality factor is accounted for in the "lodestar" determination and underscores that increases can in fact be made only for atypical or exceptional quality services:

> As a first principle, the court must recognize that a consideration of "quality" inheres in the "lodestar" award: counsel who possess or who are reputed to possess more experience, knowledge and legal talent generally command hourly rates superior to those who are less endowed. Thus, the quality of an attorney's work *in general* is a component of the reasonably hourly rate; this aspect of "quality" is reflected in the "lodestar" and should not be utilized to augment or diminish the basic award under the rubric of "the quality of an attorney's work". *Id.* at 69,635. (Emphasis by the court.)

Accordingly, *if* any increase is deemed warranted, the District Court must set forth factual findings as to why

the *particular category of services* rendered is considered to be of atypical or exceptional quality:

> Further, in increasing or decreasing an attorney's compensation, the district judge should *set forth as specifically as possible the facts that support his conclusion. Lindy I, supra,* at 169. (Emphasis supplied.)

However, if the District Court cannot articulate *facts* supporting an increase in the fee determined on an hourly basis, the applicant will still be adequately compensated: "The value of an attorney's time generally is reflected in his normal [hourly] billing rate." *Grinnell I,* 495 F.2d at 473. And in *Lindy I,* the Court specifically stated: "[T]he attorney will receive an otherwise reasonable compensation for his time under the figure arrived at from the hourly rate." 487 F.2d at 168.

Despite the unequivocal rule of law that a trial court can increase the fee determined on an hourly basis only upon a finding that particular services were of *atypical* and *exceptionally high* quality, the District Court below summarily concluded: "The hours spent on settlement administration should be compensated at twice the basic rate." (A1178) However, there simply is *no* evidence that the District Court had any knowledge of or exposure to the character of services of the attorneys' claimed 1,350 hours on "settlement administration" (A972), much less any reason to conclude that the time spent was of "atypical quality" or "of an unusual degree of skill." It is simply incredible that the class was charged $200 per hour for the time of a senior attorney who claimed 560 hours on this routine task (A972) which he himself testified consisted of correspondence, telephone calls, and review of claim forms (A786-A787). This is particularly incredible since he claimed virtually successive days of 10 to 14 hours on settlement administration (A934).

It is indeed significant that in attempting to justify the quality of the services he allegedly performed on behalf

of the class, Petitioner contends that he "alone was given full responsibility for all further class action administration, including control over investment and disbursement of settlement funds and resolution of all outstanding challenges to claims." (Petitioners Br. at 13-14.) It is characteristic of Petitioner's *non*-litigating efforts in this case that these routine matters are the prime activities he can claim to justify a fee award of almost $900,000. It is difficult to imagine (particularly in view of his claim of experience in other class actions) that it took any great degree of skill to select an escrow account in which to deposit the settlement funds. Also, much of the work in distributing the fund was undoubtedly undertaken by the accounting firm for which he was awarded $27,505 in expenses (A1178).

More than half of all of the time claimed or 1,750 hours, for which the class was assessed almost $400,000, was devoted to these routine tasks (A1178). Of course, *there was no risk factor* whatsoever involved in administering the settlement or in investing or distributing the funds because the case had already been settled. Nonetheless, the very high hourly rates charged for these routine tasks were *doubled* and *tripled* by the District Court without *any* findings as to the quality of the work performed.

Recognizing the sparsity of legal services for which he can seek an award of fees against the class, Petitioner claims credit for the interest which has accrued on the settlement fund. However, the settlement fund belongs to the class members, and this argument was laid to rest by Judge Metzner in his first fee decision:

> The installment payments are for the benefit of the defendants. The claimants are being deprived of the use of the money because of the installment procedure, and are entitled to interest as compensation for that loss. 356 F. Supp. at 1392.

Finally, in *Lindy II*, the Court of Appeals rejected as "frivolous" the argument that the fee applicants were entitled to interest. *Id.* at 69,638.

V. PETITIONER SEEKS TO REARGUE *GRINNELL I*

Apparently conceding that the District Court did not comply with the mandate of *Grinnell I*, Petitioner attempts to avoid having the second fee award set aside by rearguing this Court's prior decision. Petitioner relies extensively on cases in which the standards promulgated in *Grinnell I* and *Lindy I* were not applied, and in which excessive fees were awarded. (Petitioner's Br. at 39-44.)

For example, Petitioner's heavy reliance on *Arenson* v. *Board of Trade of the City of Chicago*, 372 F. Supp. 349 (N.D. Ill. 1974), is characteristic of his cavalier approach to the principles promulgated in *Grinnell I*. In *Arenson*, the settlement resulted in savings to the class of $800 million, and the Court made *specific, detailed* findings as to both the novelty of the case and the absence of prior government litigation. 372 F. Supp. at 1352-1354, 1356.

Nonetheless, *Arenson* is badly decided. Although the District Court did refer to *Lindy I*, *id.* at 1354, it later cited a case which it described as "*Philadelphia Housing, et al.* v. *American Radiator & Standard Sanitary Corp., et al.*, No. 41773 (E.D. Pa. 1973)," for the proposition that "an award of over $400 an hour was approved in the multidistrict litigation involving plumbing fixtures." *Id.* at 1357. First, *no* fee award was made in "*Philadelphia Housing Authority*" in 1973 and of necessity, the Court must have been referring to the District Court's *first fee award which was set aside in Lindy I*. Conceivably, the Court was misled into believing that the so-called "*Philadelphia Housing*" case was *not* the case reversed on appeal. Moreover, in note 14, the Court in *Arenson* also relied on the District Court's opinion which was *reversed* by this Court in *Grinnell I*.

Also, *Arenson* has been repudiated by Judge Will in *Liebman* v. *Peterson Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974), sitting in the same district in which *Arenson* was decided. Based on the information of record in *Liebman*, Judge Will found that the "normal hourly rates" applied in *Arenson* prior to their increase for the quality factor were too high, 63 F.R.D. at 696, and that a survey submitted covering most of the firms participating in the case—including "some of the largest and best known Chicago firms"—disclosed "an average normal hourly rate of $85.00 for senior trial partners, $62.00 for middle trial partners and $41.00 for associates with two years' experience". 63 F.D.R. at 697.

This is persuasive authority that the $125 per hour rate applied to Petitioner's time claims was sufficiently generous to provide adequate compensation on an hourly basis for the very high quality legal services to which the class was entitled. As stated above, *Lindy II* made it emphatically clear that "the quality of an attorney's work *in general* is a component of the reasonable hourly rate; this aspect of 'quality' is reflected in the 'lodestar' and should not be utilized to augment . . . the basic award under the rubric of the 'quality of an attorney's work'." *Id.* at 69,635.

Judge Will also found in *Liebman* that the fees determined on an hourly basis were adequate to provide reasonable compensation for the claimed services, finding "no cause to adjust the normal hourly rates to reflect any additional factors such as contingency, complexity or amount of the recovery." 63 F.R.D. at 700-701. Some additional observations of Judge Will in *Liebman* are most persuasive:

> [W]e find it difficult to believe that skilled lawyers will be unwilling to serve the public interest and pursue the rights of class members under a fee formula which results in the kind of allowances represented herein. If the present plaintiff class action bar can find richer rewards elsewhere, we have no doubt that other competent counsel will step forward.
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> * * *

> No private attorney in this case can seriously contend that the hours and rates are inaccurate or unfair. *The only possible basis for attacking the allowances is that a higher than normal rate should be allowed routinely in class actions or that the amount recovered should govern regardless of time devoted or services rendered.* 63 F.R.D. at 701-702. (Emphasis supplied.)

Of course, this is the very holding of *Grinnell I*—that in settled class actions, higher fees should *not* be routinely awarded or based on a percentage of the amount received. 495 F.2d at 469-471. In fact, Judge Moore in *Grinnell I* anticipated Petitioner's "bootstrapping" of excessive fee requests by reference to other cases involving unconscionable fees, and emphatically rejected it:

> Appellee has attempted to justify his fee by pointing to other cases where the fee awards were even more grandiose.
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> However, instead of bolstering his position, these observations merely illustrate the results that occur when a fee is awarded on a contingency basis without reference to the labor actually expended on the client's behalf. 495 F.2d at 472-473, n.13.

Again, the cases cited by Petitioner merely emphasize that some trial courts, such as the District Court below on remand, cite the rubric of *Lindy I* or *Grinnell I*, but still award fees as if these two appellate court decisions had never been rendered. Without articulating the reasons for applying (a) the quantity factor, or (b) the risk factor, or (c) any meaningful evaluation of the services performed in the various categories of activity, the District Court merely concluded in summary fashion:

> The complexity of the issues presented in this litigation, the competence with which they were presented, the success achieved, and most importantly, the risk of litigation merit multiplying by 3 the basic fees for most categories of services (A1179).

Petitioner's sole support for this arbitrary trebling of the basic hourly fees and the $900,000 fee award is to describe it as "modest" compared to fees charged in other cases—again returning to the "contingent fee syndrome" rejected in *Grinnell I*. (Petitioner's Br. at 43.) In fact, Petitioner contends: "[F]ees in antitrust actions litigated on a contingency basis are normally contracted for, and charged at, approximately 20% to 40% of recovery." (Petitioner's Br. at 38.) Of course, in a non-class private treble damage action litigated to judgment, counsel usually has one or more retained clients who voluntarily entered into a fee contract. Moreover, *Lindy II* expressly rejected the argument that private fee arrangements have any relevance to assessing fees against a class:

> The court should not have mixed considerations of the fee determined by equitable principles (the equitable fund award) with considerations of the fees dependent on private contracts. The fee with which the court was concerned is a child of equity—not of express contract. *Id.* at 69,637.

In short, private fee contracts, and equitable fund theory fee awards made by comparison to private fee contracts or grounded in the "contingent fee syndrome", simply have no relevance under the rules of *Grinnell I*, and *Lindy I* and *II*. However, both the District Court below and Petitioner have returned to the contingent fee syndrome as the only justification for the fees awarded, despite the fact that in rejecting that approach in *Grinnell I*, this Court specifically held that it was "*minimizing the important role traditionally played by the magnitude of the recovery.*" 495 F.2d at 471. (Emphasis supplied.)

Judges Gibbons and Seitz in *Lindy II* also recognized the error of the District Court in making its second fee decision in that litigation because *Lindy I* was only ostensibly followed in evaluating the risk and quality factors:

> The question, then, is whether a valuation of the contingency and quality factors in this case at one hundred per cent of the reasonable value of the services performed bears a reasonable or a totally unreasonable relationship to that value. It seems clear to me that the district court, . . . arbitrarily selected a multiplication factor of one hundred per cent without really analyzing the factors which in *Lindy Brothers I* we said should govern disposition of the fee question. . . . *Such appellate deference to an arbitrary and unexplained selection of a one hundred per cent quality and contingency factor is the seed which may bear fruit in the undermining of the significant advance in the law which Lindy Brothers I heralded.* For if the district courts can pull contingency and quality multipliers out of thin air, calculating the reasonable value of an attorney's time as a measure of the quantum meruit for his services to unrepresented class members will soon become a meaningless rite. Then . . . fee awards in class actions will be as standardless as before we acted to rationalize the process. *Id.* at 69,642. (Emphasis supplied.)

Similarly, others have questioned whether *Lindy I* and *Grinnell I* will mark a new approach to fee awards, or will merely be ignored by the lower courts. Soon after the landmark decision in *Lindy I*, one commentator stated that it "would revolutionize the procedure for awarding attorneys' fees in class actions and change guidelines used to determine fees" *if* followed by other courts. Brodsky, "Attorneys' Fees In Class Actions", 170 *N.Y.L.J.*, No. 107, at 1 (December 5, 1973). That prognostication was soon realized when this Court in *Grinnell I* did follow *Lindy I* in reversing as excessive the initial fee award made to Petitioner. In fact, *Grinnell I* quoted verbatim the key holdings of *Lindy I*.

Another commentator has characterized the *Lindy I* and *Grinnell I* holdings as follows:

> In 1973 and 1974, there came before the Third and Second Circuits a pair of vigorously challenged antitrust class action fee awards that the appellate courts

> found disturbing in amount. The result was the *Lindy Bros.* and *Grinnell* opinions, which are generally regarded as making a sharp turn away from the benefit or percentage approach in the direction of a rigorous hourly rate approach to class action fees. Springer, "Fee Awards in Antitrust Litigation", 44 A.B.A. *Antitrust L.J.* 97, 108 (1975).

However, as held in *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92, 109-110 (3rd Cir. 1976), although some District Courts have cited *Lindy I* and *Grinnell I* and paid "lip service" to the guidelines set forth therein, the analysis and specific findings mandated by those decisions have not been set forth with the particularity necessary to permit meaningful appellate review: "In his order the trial judge cited *Lindy Bros.* . . ., but did not adduce any explanation for the amount of the award." Judge Adams further stated in *Pitchford*:

> The specific application of these principles in each case must be explained by the district court when it orders the award of attorney's fees. *Because the explicit findings and analysis required by Lindy were not explicated, we are compelled to return the attorney's fee issue to the trial court. Id.* at 110. (Emphasis supplied.)

Likewise, in remanding in *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292, 298 (3rd Cir. 1974), the Court held:

> [A]ppellee contends that the District Court did, in fact, analyze the factors highlighted in *Lindy*. We disagree. Although reference is made to the first of the factors, *we find neither the specificity mandated by Lindy nor an analysis of the remaining factors outlined by Chief Judge Seitz in Lindy.* (Emphasis supplied.)

This failure of the District Court to make the specific detailed findings mandated in *Lindy I* and *Grinnell I* has also been noted in the literature: "An analysis of the most recent cases . . . leads one to wonder whether the new 'hourly rate' rubric is anything more than a new bottle for the same wine. . . ." Springer, *supra*, at 110.

Appellate court dissatisfaction with the failure of some trial courts to particularize their reasons for reaching summary conclusions in discretionary matters is not novel. (See the discussion, *supra, of Allis-Chalmers; Protective Committee* v. *Anderson*; and *Gumer.*) Significantly, among the cases cited in *Allis-Chalmers, supra,* in support of the proposition that the District Court should "clearly articulate the reasons and factors underlying its decision" were *Lindy I* and *Grinnell I.* 521 F.2d at 364, n.5.

Objectors respectfully submit that the specificity required by *Grinnell I* in evaluating the factors affecting fee awards was indeed a departure from the prior case law in which fee awards were rarely decided in a litigated context, and even more rarely reviewed on appeal. In *Lindy II,* the Third Circuit emphatically reaffirmed its holdings in *Lindy I.* If the principles of *Lindy I* and *Grinnell I* are to be the law of this Circuit, this Court should likewise reaffirm those principles in *Grinnell II* by setting aside the District Court's second fee award.

VI. THE INADEQUACY OF PETITIONER'S TIME SUBMISSIONS

As recognized by the District Court, there were gaps in the record-keeping procedures in Petitioner's office, and there were periods in which fees were claimed, although admittedly, no contemporaneous time records were maintained (A1177). Despite the clear law of this Circuit that an attorney who intends to apply for fees must maintain "accurate and current" time records, *Hudson & Manhattan Railroad Co.,* 339 F.2d 114 (2d Cir. 1964), the District Court merely summarily concluded, without making any factual findings or adjustment to the total time claimed, as follows:

> After hearing the evidence, I find that the hours allocated for the periods that were not covered by time records are fair and reasonable (A1177).

In view of the 16- to 20-hour days which attorneys in Petitioner's office said it was not "uncommon" for them to claim (A813) and the claims of senior attorneys of 10 to 14 hours per day spent on routine settlement administration tasks (A934), in conjunction with the fact that the attorney sponsoring Petitioner's time claim executed his affidavit three and a half years after the alleged reconstruction of the time took place (A910) and had no work sheets showing how that claimed time was reconstructed (A776), Judge Metzner's summary conclusion is clearly erroneous. In contrast, in *Blank* v. *Talley Industries, Inc.*, 390 F. Supp. 1, 4 (S.D. N.Y. 1975), Judge Weinfeld found:

> [T]he failure to keep proper records is a factor to be considered in accepting the reliability of estimates made long after the rendition of services to support a fee application.
>
> * * *
>
> Some of the estimates appear to exceed the time reasonably required to perform the particular services described.
>
> * * *
>
> In other instances, as the record glaringly reveals, partners rendered services for which compensation is sought at partners' time rates, when such services readily could have been performed by junior associates. (Footnotes omitted.)

Also, in *Meade Land & Development Co., Inc.*, 527 F.2d 280, 284 (3d Cir. 1975), Chief Judge Seitz wrote:

> We stress that it is the attorney's obligation to keep and submit to the court time records supporting an application for compensation. And, absent unusual circumstances, it is the court's independent obligation to give credit only where there are such supporting documents, even in cases where no interested parties raise objections to the claim.

Based on *Meade,* Judges Gibbons and Seitz stated in *Lindy II* that it was a "close question" whether the fac-

tual showing as to the sufficiency of the time records submitted in that case justified any fee award, but noted that "a fairly meticulous showing" was made on that issue. *Id.* at 69,639 and n.1. No findings, much less "meticulous" findings were made below as to the adequacy of Petitioner's time records, and yet full credit was given for all the time claimed.

CONCLUSION

For all of the foregoing reasons, the District Court's second fee award to Petitioner should be reversed.

Respectfully submitted,

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September 16, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF DETROIT, et al. v. GRINNELL COPRORATION, et al., BAY FAIR SHOPPING CENTER, EXXON CORPORATION, FRIENDSWOOD DEVELOPMENT COMPANY, INTERNATIONAL LUBRICANT CORPORATION and SHELL OIL COMPANY, Claimants, Appellants.	Docket No. 76-7252

CERTIFICATE OF SERVICE

I, G. Joseph King, an attorney for appellants in the above-entitled appeal, hereby certify that on the 16th day of September, 1976, I served two copies of the Reply Brief of Class Members-Appellants, in accordance with Rules 25(a), and 31(a), Fed.R.App.P., upon Gordon B. Spivack, Esquire, Lord, Day & Lord, 25 Broadway, New York, New York, 10004, by depositing same in the United States mail, first class postage prepaid.

G. Joseph King